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MARTEGO SDN BHD v. ARKITEK MEOR & CHEW SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: WA-24C-39-06-2016 &
B WA-24C-47-06-2016]
1 NOVEMBER 2016

C ***CONSTRUCTION LAW:*** *Adjudication – Jurisdiction – Fees for architectural consultancy services – Whether Adjudicator acted in excess of jurisdiction in arriving at decision – Construction Industry Payment and Adjudication Act 2012, ss. 25(a), 37(1)*

D ***CONSTRUCTION LAW:*** *Adjudication – Claim for professional fees – Termination of contract – Whether firm of architects may claim professional fees in adjudication for consultancy services rendered in construction contract – Construction Industry Payment and Adjudication Act 2012, s. 37(1) – Architects Act 1967, s. 7A – Architects Rules 1996, r. 24*

E ***CONSTRUCTION LAW:*** *Adjudication – Setting aside – Application to set aside decision of Adjudicator – Adjudicator rejected request for oral hearing – Adjudication proceeding conducted by way of submission of documents only – Whether there was need for oral hearing for dispute – Whether there was breach of natural justice – Construction Industry Payment and Adjudication Act 2012, s. 25(a)*

F The plaintiff ('Martego') had engaged the defendant ('ARMC') as the project architect for a proposed development project. Martego issued a letter of appointment ('the contract') and after duly accepting it, ARMC commenced work until the contract was terminated by the plaintiff. ARMC then commenced adjudication proceedings against Martego and claimed for the balance of their professional fees in the amount of RM599,500. The G adjudicator did not see any need for an oral hearing for the dispute and pursuant to s. 25(a) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'), rejected the request for an oral hearing. The adjudication proceeding was conducted by way of submission of documents only. At the end of the adjudication, the adjudicator determined that H ARMC's total entitlement (RM631,228), less the amount already paid over by Martego (RM372,678) prior to the commencement of the adjudication, was the balance sum of RM258,550 due and owing from Martego to ARMC, exclusive of pre and post-award interest and costs ('the adjudication decision'). Martego filed to set aside the adjudication decision ('OS 39') on the grounds that (i) the adjudicator acted in excess of his jurisdiction in I delivering the adjudication decision; and (ii) there was a denial of natural justice in the adjudicator's failure to hold an oral hearing. On the other hand, ARMC applied for the enforcement of the adjudication decision ('OS 47').

The issues that arose for the court's determination were (i) whether the contract between ARMC and Martego for the payment of fees for architectural consultancy services rendered was a construction contract under the CIPAA; (ii) whether a firm of architects may claim its professional fees in an adjudication under the CIPAA with respect to consultancy services rendered in a construction contract; and (iii) whether there was a breach of natural justice when the adjudicator decided to proceed with the adjudication without an oral hearing.

Held (dismissing OS 39; allowing OS 47):

(1) Section 2 of the CIPAA provides that the CIPAA applies to every construction contract made in writing. Under s. 4 of the CIPAA, a 'construction contract' means a construction work contract or a construction consultancy contract. A construction consultancy contract would cover and include a contract to carry out consultancy services in relation to construction work and 'includes' planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration and project management services. The various components after the word 'includes' can be present alone or in combination with other services rendered. The fact that there was the component of contract administration in the overall architectural services rendered, did not turn the contract into one of pure contract administration. It remained very much a contract for architectural consultancy services which comes within the meaning of construction consultancy contract. Therefore, the adjudicator had the jurisdiction to adjudicate the payment claim of ARMC premised as it was on services provided under a construction consultancy contract. (paras 12, 13, 23, 24, 41 & 42)

(2) Section 7A of the Architects Act 1967 ('the Act') and r. 24 of the Architects Rules 1996 ('the Rules') are not the only mechanism to resolve disputes on architect fees. Section 37(1) of the CIPAA acknowledges the fact that the other dispute resolution process can be launched simultaneously. After the introduction of statutory adjudication under the CIPAA, the architects would have an additional mode of dispute resolution which is adjudication. At any rate where adjudication is concerned, the CIPAA is certainly a special piece of legislation that would prevail over the Act. The object and purpose of the CIPAA is to provide a solution to payment problems that stifles cash flow in the construction industry (paras 76, 78, 84, 87 & 93)

(3) The adjudicator had carefully considered the request for an oral hearing and had given his reasons for rejecting the request. By no stretch of the imagination or ingenuity could it be said that the adjudicator had committed a breach of natural justice merely because he did not decide the dispute in accordance with the preferred manner advocated by one

of the parties or refused to assign the weight to the evidence as expected by a party. Furthermore, the parties were given ample opportunities to submit documents, make submissions and reply to submissions. (paras 110 & 123)

(4) An architect's fees is claimable under adjudication under the CIPAA. The proper course for the party who is unsuccessful in an adjudication must be to pay the amount that he had been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct, whether in facts or in law, he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he had exceeded his jurisdiction or breached the rules of natural justice is likely to lead to a substantial waste of time and expense. (paras 126 & 129)

Case(s) referred to:

ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Case [2015] 1 LNS 756 HC ***(refd)***

Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd [2007] 6 CLJ 93 FC ***(refd)***

AM Associates (Singapore) Pte Ltd v. Laguna National Golf and Country Club Ltd [2009] SGHC 260 ***(refd)***

Carillion Construction Ltd v. Devonport Royal Dockyard Ltd [2005] EWCA Civ 1358 ***(refd)***

Cowlin Construction Limited v. CFW Architects [2002] EWHC 2914 ***(refd)***

Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal [1992] 1 LNS 28 SC ***(refd)***

Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors [2001] 1 CLJ 604 HC ***(refd)***

Foster Wheeler E&C Malaysia Sdn Bhd v. Arkema Thiochemicals Sdn Bhd & Another Case [2015] 1 LNS 632 HC ***(refd)***

Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd [2002] 4 CLJ 796 HC ***(refd)***

Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership) [2015] 9 CLJ 273 FC ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Mary Colete John v. South East Asia Insurance Bhd [2010] 8 CLJ 129 FC ***(refd)***

PP v. Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166 ***(refd)***

Ranhill E&C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases [2015] 1 LNS 1435 HC ***(refd)***

SK Gupta & Anor v. KP Jain & Anor 1979 AIR 734 ***(refd)***

Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA ***(refd)***

Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah & Ors [2015] 3 CLJ 1017 FC ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

Legislation referred to:

Architects Act 1967, ss. 2, 7A(1)(b), 35

Architects Rules 1973 (since repealed), r. 21

Architects Rules 1996, r. 24, Third Schedule sub-rr. 23, 24

Construction Industry Payment and Adjudication Act 2012, ss. 2, 3, 4(a), (b), (c), (d), (e), 5, 15, 16(1)(a), 25(m), 27(2), (3), 37(1)

Construction Industry Development Board Act 1994, s. 2(a), (b), (c), (d), (e)
Interpretation Acts 1948 and 1967, s. 17A

Building and Construction Industry Security of Payment Act 1999 [NSW], s. 3
Building and Construction Industry Security of Payment Act 2002 [Aus], ss. 1, 6
Construction Contracts Act 2004 [Aus], ss. 3, 5(1), (2), (3)(b)
Construction Contracts Act 2013 [Ireland], s. 1(2), 2
Housing Grants, Construction and Regeneration Act 1996 [UK], s. 104

(Originating Summons No: WA-24C-39-06-2016)
For the plaintiff - Tanya Lopez; M/s Shook Lin & Bok
For the defendant - Siva Sankaran & Chow Yu Jiin; M/s Tan Swee Im, Siva & Partners

(Originating Summons No: OS WA-24C-47-06-2016)
For the plaintiff - Siva Sankaran & Chow Yu Jiin; M/s Tan Swee Im, Siva & Partners
For the defendant - Tanya Lopez; M/s Shook Lin & Bok

Reported by Najib Tamby

JUDGMENT

Lee Swee Seng J:

[1] This case deals with the interesting question as to whether, an architect rendering architectural services with respect to a construction project, may claim under adjudication his fees outstanding from his client, the owner of the project.

[2] Martego Sdn Bhd ("Martego") is the plaintiff in the setting aside application (OS 39) of an adjudication decision delivered on 14 April 2016 and the defendant in the enforcement application (OS 47). Arkitek Meor & Chew Sdn Bhd ("ARMC") is the defendant in OS 39 and the plaintiff in OS 47. ARMC is the successful claimant in the adjudication and Martego is the respondent and they shall be referred to as such in these two OS and sometimes by their respective company names.

[3] Martego had also, on 10 June 2016, filed an application for stay ("stay application") of the adjudication decision pursuant to s. 16(1)(a) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

[4] The stay application had become academic, as ARMC's solicitor had, at the case management on 16 March 2016, placed on record that a winding up notice and/or petition shall not be served on Martego unless and until a prior five-day notice is given to Martego. No such notice had been issued to Martego evincing no intention on the part of ARMC to proceed with winding up before the hearing of both OS fixed to be heard together.

[5] Martego accepts that ARMC's application for enforcement in OS 47 shall follow consequently in the event Martego's setting aside application in OS 39 is dismissed.

Project

[6] Martego had engaged ARMC as the project architect for the proposed development on Lots 849, 851, 690 and PT78, Section 57, Changkat Perak, Off Lorong Perak, Kuala Lumpur (the "project") comprising the following:

(a) Three high-rise blocks (Tower 1, 2 and 3), 43 storeys high, with 832 residential units and two storeys of recreational facilities, on top of a podium with five storeys of car-parking areas, one storey of car-parking basement and ancillary M&E spaces.

(b) one high-rise block (Tower 4), 19 storeys high, with 46 residential units and two storeys of recreational facilities, on top of a podium with four storeys of car-parking areas and ancillary M&E spaces.

[7] Martego issued a letter of appointment (ref MSB/ECA/LOA/c1) dated 22 August 2014 (the "contract"), which was duly accepted by ARMC. ARMC commenced work under the contract but its contract was terminated by plaintiff on or about 7 August 2015. ARMC accepted the termination on 10 August 2015.

Problem

[8] The dispute is on ARMC's claim for its fees and remuneration for architectural consultancy services rendered as an architectural consultancy practice.

[9] The claimant ARMC had claimed the amount of RM599,500 being the balance of their professional fees. The adjudicator did not grant ARMC the whole of the sum claimed. The adjudicator determined that ARMC's total entitlement (RM631,228) less the amounts already paid over by Martego (RM372,678) prior to the commencement of adjudication was the balance sum of RM258,550 due and owing from Martego to ARMC, exclusive of pre and post-award interest and costs.

Prayers

[10] The grounds for Martego's application for setting aside is two-fold; first it is on the ground that the adjudicator has acted in excess of his jurisdiction in delivering the adjudication decision and secondly, there has been a denial of natural justice in the adjudicator's failure to hold a hearing despite numerous requests from Martego.

Principles

[11] Section 15 of the CIPAA states that an aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) The adjudication decision was improperly procured through fraud or bribery;

(b) There has been a **denial of natural justice**;

(c) The adjudicator has not acted independently or impartially; or

(d) The **adjudicator has acted in excess of his jurisdiction**. (emphasis added)

Whether The Contract Between The Architect And Its Client Martego For The Payment Of Fees For Architectural Consultancy Services Rendered Is A 'Construction Contract' Under CIPAA

[12] The above determination is important because if the said contract is a 'construction contract' then the payment claim for outstanding fees for services rendered under a construction contract would be claimable by way of adjudication. CIPAA applies to every construction contract made in writing as provided for under s. 2.

[13] Under s. 4 of the CIPAA a "construction contract" means a construction work contract or a construction consultancy contract. Further "payment" means a payment for work done or services rendered under the express terms of a construction contract. Therefore a "payment claim" may be with respect to a "construction consultancy contract".

[14] The appointment of ARMC as Martego's project architect was by way of Martego's letter of appointment dated 22 August 2014 ("contract"). Under para. 3(b) of the contract, ARMC's scope of services was for 'contract administration' and the scope of work thereunder includes, but is not limited to, recommending the list of contractors and sub-contractors for tender and issuing progress claim certificates to the contractors upon consultation with Martego.

[15] The ambit of both a construction work contract and a construction consultancy contract are expansively defined. The definition of 'construction consultancy contract' is relevant and it means:

> ... a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, **architectural work**, engineering, surveying, exterior and interior decoration landscaping and project management services. (emphasis added)

[16] It is important to note that the Federal Court had, in *Lembaga Pembangunan Industri Pembinaan Malaysia v. Konsortium JGC Corporation & Ors (Sued As Incorporated Partnership)* [2015] 9 CLJ 273; [2015] 6 MLJ 612 the opportunity to interpret the phrase 'construction works' in s. 2 of the Construction Industry Development Board Act 1994 (Act 520). The definition of 'construction works' in Act 520 was laid out in para. (59) of the Federal Court judgment.

[17] Sub-paragraphs (a) to (e) of the definition of 'construction works' in Act 520 are identical to sub-paras. (a) to (e) of the definition of 'construction work' in CIPAA, save for the addition of the word 'oil' in sub-para. (d) of Act 520 which is absent from the definition in CIPAA. In interpreting the word 'includes' which is present in the definition, the Federal Court held:

> [62] Having perused s 2 of the Act and the facts of this case, **we have instead placed our reliance on the word 'includes'**, rather than alluding to the principle of '*noscitur a sociis*'. **The word includes is generally used to enlarge words or phrases in a statute, as in the current Act, with those words or phrases together with those they should include, understood to have their natural meaning** ... Edgar Joseph Jr in *Public Prosecutor v. Hun Peng Khai & Ors* [1984] 2 MLJ 318 at p 324 had occasion to remark that **the word 'includes' is a word of extension and not of definition**. Evans J in *Loke Yung Hong v Ng See See (F) and 3 Others* (1948) 14 MLJ 123 at page 128 opined:
>
> > ... one using the word 'include' indicates an extension of the ordinary meaning which may be attached to the word.
> >
> > (emphasis added)

[18] It may be gleaned from the Federal Court judgment that 'architectural work' is not meant to be read as a definition of 'construction consultancy contract' under CIPAA. Rather, it is an extension of the phrase 'construction consultancy contract'.

[19] Miss Tanya Gomez further submitted that the phrase 'construction consultancy contract' must be construed conjunctively rather than disjunctively as the operative phrase used is '... **and includes** ...' (emphasis added). If a disjunctive interpretation was intended, the word 'or' would have been used in place of 'and' (see *PP v. Datuk Tan Cheng Swee & Ors* [1979] 1 MLJ 166 at 179, Federal Court and *Mary Colete John v. South East Asia Insurance Bhd* [2010] 8 CLJ 129; [2010] 6 MLJ 733 at 745, Federal Court.

[20] She then submitted that the phrase 'architectural work' therefore cannot be read in isolation and that a contractor under a 'construction consultancy contract' must meet the requirements of the definition in s. 4 and must:

(a) carry out consultancy services in relation to construction work; and

(b) also carry out planning, feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services collectively.

[21] She argued that since it is ARMC's position that it has carried out 'architectural work' only, its contract with Martego would fall short of the requirements for a 'construction consultancy contract'.

[22] Her stand is that a 'construction consultancy contract' would encompass design and build contracts where a contractor would be employed by the client to carry out works which would be all-encompassing and would include planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services within the dictates of the definition in s. 2. She was at pains to stress that it would not apply to a conventional contract such as the contract between Martego and ARMC which was a contract purely for architectural consultancy services.

[23] With the greatest of respect, I find such an interpretation to be unduly straining the natural and ordinary meaning of the words used in the definition of 'construction consultancy contract'; skewing and slanting it to support one's stand that it cannot be a construction consultancy contract that has only one single element of architectural work or even perhaps a bit of project management work since what has been contracted included contract administration. To me a 'construction consultancy contract' would cover and include a contract to carry out consultancy services in relation to construction work and includes planning and feasibility study, architectural work, engineering, surveying, exterior and interior decoration, landscaping and project management services. If Parliament had wanted it to be confined to only a 'design and build contract' they could have said so in clear terms and the industry understands what a 'design and build contract' is.

[24] These various components after the word "includes" can be present alone or in combination with the other services rendered such that the party engaged in such a contract may be providing just architectural works, just engineering services, just surveying services, just exterior and interior decoration services, just landscaping services or just project management services or a combination of these services.

[25] In *Tunku Yaacob Holdings sdn Bhd v. Pentadbir Tanah Kedah & Ors* [2015] 3 CLJ 1017; [2016] 1 MLJ 200, Ramly Ali FCJ in delivering the majority decision held:

> [30] ... On the presumption that the Legislature does nothing in vain, the court must endeavour to give significance to every word of the law legislated and it is presumed that if a word of phrase appears in a legislation, it was put there for a purpose and must not be disregarded ...

[26] His Lordship went on further to explain that the court must give effect to language of a legislation that is clear and explicit:

> [32] Where the language of a legislation is clear and explicit, the court must give effect to it, whatever may be the consequence, for in that case, the words of the legislation speak of the intention of the Legislature. If the precise words used are plain and unambiguous, the court is bound to construe them in their ordinary sense, and not to limit those plain words by other considerations ...

[27] The use of the word "includes" in definitions is a device designed to give the definition an expansive meaning and not an exhaustive one; the matters stated therein are more by way of examples leaving the scope and ambit of it rather open-ended within that broad definition. In *Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd* [2002] 3 CLJ 624; [2002] 2 MLJ 707 at p. 632 (CLJ); p. 714 (MLJ), per Gopal Sri Ram JCA (later FCJ) observed as follows:

> Particular emphasis is to be placed upon the world 'includes' in this definition. On settled principles of statutory interpretation, it is clear where an Act of Parliament employs the expression 'includes' to define some other word or expression the intention is to leave the meaning of the expression open ended ...

[28] If at all, the design and build contracts envisioned by Parliament, would be inclusive and not exhaustive. In other words, the definition of "construction consultancy contract" would well cover a "design and build" contract but it is not confined to that. It covers the professional services of an architect as well as engineers and surveyors.

[29] I agree with Mr Siva Sankaran for ARMC that to narrowly confine "includes" to a "design and build" contract would be contrary to s. 17A of the Interpretation Acts 1948 and 1967. Section 17A states, "A construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote the purpose or object ..."

[30] The important thing is that these works and services must be integral to the construction consultancy contract and not incidental thereto. For example, if a lawyer advises on a construction contract, his legal fees is not claimable under CIPAA as it is not only not provided for in the inclusive definition but also not integral to construction consultancy contract but only incidental thereto. Likewise, finance and accounting services in relation to construction consultancy contract.

[31] The Indian Supreme Court in *SK Gupta and Another v. KP Jain and Another* 1979 AIR 734, SC has this helpful passage:

> 25. ... Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. **But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning**. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having the opposite effect ... **The frame of any definition more often than not is capable of being made flexible** but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible. (emphasis added)

[32] Learned counsel for Martego then, in what appears to be a stumbling upon the missing key that would clarify all doubts said that in s. 4, the term 'contract administrator' is defined as:

> … an **architect**, engineer, superintending officer or other person howsoever designated who **administers a construction contract.** (emphasis added)

[33] According to her, this definition of 'contract administrator' offers the one and only mention of the word 'architect' in CIPAA and the definition accords with cl. 3(b) of the contract which defines ARMC's scope of work to include contract administration.

[34] She highlighted that the definition of 'contract administrator' also encompasses one other relevant professional in the construction industry, namely engineers who, like architects, are required to administer and manage construction contracts which they enter into with contractors and sub-contractors.

[35] She then pointed out that the phrase 'contract administrator' is used only once in CIPAA, in s. 25(m) which states that:

> The adjudicator shall have the powers to:
>
> ...
>
> (m) Review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute.

[36] According to her, it is imperative to note that s. 25(m) makes a distinction between 'parties' to the adjudication proceedings and 'contract administrator'. From the use of the disjunctive 'or', it therefore becomes glaring that there is an obvious separation of the group of people referred to as 'parties' which are parties to a construction contract and by extension, to the adjudication proceedings.

[37] She then submitted that the mere fact that Legislature has seen it fit to define a 'contract administrator' exclusively and to specifically mention architects, is evidence of its intention to exclude architects from availing themselves of the adjudication proceedings under CIPAA, especially in light of the fact that there is a specific legislation in the form of the Architects Act.

[38] Again I must be pardoned for not being able to appreciate this finer argument of learned counsel for Martego. The fact that an architect is singled out as an example of a 'contract administrator' surely cannot mean that the Legislature must have minded to exclude him from being able to make his claim. Would an engineer be excluded from making his claim for services rendered just because he is more likely to be a contract administrator? The definition of a 'contract administrator' has no bearing whatsoever to the unravelling of the meaning of a 'construction consultancy contract'.

[39] ARMC's scope of services as expressly stated in the contract can be found in cl. 3 and states:

> The fees proposed shall embrace **architectural services** for detailed design, tender and construction drawings submission, and **contract management** and shall include submission of amendments as may be required by the Owner, Authorities or for other reasons therefrom:
>
> (a) Detailed Design Development ...
>
> (b) Contract Administration
>
> ...
>
> (ii) To recommend the List of Contractors and Sub-Contractors for Tenders;
>
> (iii) To award the Contract on the Client's behalf
>
> (c) Others ... (emphasis added)

[40] Under s. 2 of the Architects Act 1967, "architectural consultancy services" means the provision of architectural consultancy advice and services pertaining to all or any of the following:

(a) Submission of plans or drawings to any person or local authority in Malaysia;

(b) Conceptualisation, research and development of any design for the built environment;

(c) Any survey, preparation of reports including environmental impact assessment reports, or investigation relating to the built environment;

(d) Project programming, construction and manufacturing programming, and product design;

(e) Planning and development services including interior design, financial advisory services, project management, contract administration and landscaping;

(f) Preparation of feasibility studies and cost estimates;

(g) Preparation of plans and other means of presentation;

(h) All services in compliance with statutory requirements;

(i) Any other activities relating to the creation, preservation and enhancement of the built environment.

[41] The fact that there is the component of "contract administration" in the overall architectural services rendered, does not turn the contract into one of pure contract administration but that it remains very much a contract for architectural consultancy services which comes within the meaning of "construction consultancy contract." It is integral to the construction work as there is no work could be carried out without the drawings of the architect

concerned, no matter how rudimentary. Here the construction works are with respect to the construction of three blocks of high-rise residential units together with recreational facilities and car parks.

[42] I would hold that the adjudicator has the jurisdiction to adjudicate the payment claim of the architect premised as it is on services provided under a construction consultancy contract.

[43] To allow an architect to claim for his fees under a scheme of statutory adjudication is not inherently on innately incompatible with adjudication. Much would depend on the scope of adjudication as may be provided for in the specific legislation governing adjudication. Learned counsel for both parties have kindly referred the court's attention to similar definitions in other jurisdictions by way of comparison.

[44] The Building and Construction Industry Security of Payment Act 2004 ("the Singapore Act") does not define 'construction consultancy contract'. However the term 'construction contract' is defined under the Singapore Act to include the supply of services which is also defined to include professional engineering services, or architectural, design, surveying or quantity surveying services, in relation to construction work. Thus an architect, engineer and surveyor can claim for their fees under adjudication in the Singapore Act. The definition of "services" is that it means:

(a) the conduct of feasibility studies, planning services, the submission of applications or other documents to any relevant authority, site supervision services, professional engineering services, or architectural, design, surveying or quantity surveying services, in relation to construction work;

[45] In Victoria, Australia, the Building and Construction Industry Security of Payment Act 2002 ("the Victorian Act") does not define 'construction consultancy contract' or 'contract administrator'. The purpose of the Victorian Act has been expressly stated in s. 1 to "provide for entitlements to progress payments for persons who carry out construction work **or who supply related goods and services** under construction contracts" (emphasis added).

[46] 'Related goods and services' is defined under s. 6 of the Victorian Act to include architectural, design, surveying or quantity surveying services in relation to construction work. So an architect would have no problem claiming his fees under adjudication in Victoria.

[47] Likewise in New South Wales, there is the Building and Construction Industry Security of Payment Act 1999 ("the NSW Act"). The purpose of the NSW Act has expressly stated in s. 3 and covers 'any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract'. 'Related goods and services' has a similar definition to the Victorian Act.

[48] In Queensland, the Building and Construction Industry Payment Act 2004 ("the Queensland Act") is similar to the Victorian Act and the NSW Act where the definition of "related goods and services" is concerned.

[49] Western Australia is even more explicit in including architectural services but excludes accounting, financial and legal services. Under s. 3 of the Construction Contracts Act 2004, ("the Western Australia Act") "construction contract" means a contract or other agreement, whether in writing or not, under which a person (the "contractor") has one or more of these obligations:

(a) To carry out construction work;

(b) To supply to the site where construction work is being carried out any goods that are related to construction work by virtue of s. 5(1);

(c) To provide, on or off the site where construction work is being carried out, professional services that are related to the construction work by virtue of s. 5(2);

(d) To provide, on the site where construction work is being carried, on-site services that are related to the construction work by virtue of s. 5(3)(b).

[50] Under s. 5(2) of the Act, professional services are related to construction work if they are:

(a) Services that are provided by a profession and that relate directly to construction work or to assessing its feasibility (whether or not it proceeds):

(i) including surveying, planning, costing, testing, architectural, design, plan drafting, engineering, quantity surveying, and project management services; but

(ii) not including accounting, financial or legal services; or

(b) Services that are provided by a profession that are prescribed by the regulations to be professional services related to construction work for the purpose of this Act.

[51] In UK, s. 104 of the UK Housing Grants, Construction and Regeneration Act 1996, ("the UK Act") construction contracts are defined as:

(1) In this part, a "construction contract" means an agreement with a person for any of the following:

(a) the carrying out of construction operations;

(b) arranging for the carrying out of construction operations by others, whether under sub-contract to him or otherwise;

(c) providing his own labour, or the labour of others, for the carrying out of construction operations.

(2) Reference in this part to a construction contract includes an agreement:

(a) to do architectural, design or surveying work; or

(b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape, in relation to construction operations.

[52] In Ireland, as defined under s. 1 of the Construction Contracts Act 2013, "construction contract" means (subject to sub-s. (2) and s. 2) an agreement (whether or not in writing) between an executing party and another party, where the executing party is engaged in any one or more of the following activities:

(a) Carrying out construction operations by the executing party;

(b) Arranging for the carrying out of construction operations by one or more other persons, whether under subcontract to the executing party or otherwise;

(c) Providing the executing party's own labour, or the labour of others, for the carrying out of construction operations.

[53] Subsection (2) of the Act stated that construction contract includes an agreement, in relation to construction operations, to do work or provide services ancillary to the construction contract such as:

(a) Architectural, design, archaeological or surveying work,

(b) Engineering or project management services, or

(c) Advice on building, engineering, interior or exterior decoration or on the laying-out of landscape.

[54] It is thus clear that our definition of "construction consultancy contract" that seeks to include the claim for architectural consultancy fees under our scheme of statutory adjudication is not inconsistent with that of more matured jurisdictions that have allowed it and though there are differences in the definitions in the different jurisdictions, the same intention can be gathered from the inclusive definitions used.

Whether A Firm Of Architects May Claim Its Professional Fees In An Adjudication Under CIPAA With Respect To Consultancy Services Rendered In A Construction Contract

[55] Learned counsel for Martego, Miss Tanya Lopez, submitted that under the Architects Act 1967 and the Architects Rules 1996 ("the Rules"), there are specific procedures provided for the resolution of disputes concerning an architect's fees through arbitration and so Parliament must have intended that dispute resolution through arbitration to prevail over

other modes of dispute resolution such as a resort to adjudication. She argued that as professional architects, ARMC is bound by the Architects Act 1967 and the Rules.

[56] She further submitted that in interpreting statutes, it must be borne at the forefront of our minds that regard must be had to the purpose in which the statute was enacted. This purposive approach was broadly set out in s. 17A of the Interpretation Acts 1948 and 1967 ("Interpretation Act").

[57] The preamble to the Architects Act stipulates that the Act is "to provide for the registration of architects and bodies corporate providing architectural consultancy services and matters connected therewith."

[58] The Rules were enacted pursuant to s. 35 of the Architects Act and bind ARMC with equal force as if it is the Act itself, as a regulation validly made under an Act must be regarded as though it were itself an enactment (see *Datin Azizah Abdul Ghani v. Dewan Bandaraya Kuala Lumpur & Ors And Another Appeal* [1992] 1 LNS 28; [1992] 2 MLJ 393 at pp. 398-399, Supreme Court).

[59] It was also submitted that the Architects Act and the Rules were enacted to:

(a) govern the registration of architects; and

(b) set out the conditions of engagement and govern the relationships between a professional architect and his client, as is observed from the Third Schedule of the Rules.

[60] Both the Architects Act and the Rules envisage situations where disputes may arise between a professional architect and his client by the provision of specific dispute resolution mechanisms. She highlighted as follows:

(a) Section 7A(1)(b) of the Architects Act: which essentially states that recovery of an architect's fee, charge, remuneration or other forms of consideration for architectural consultancy services is to be done by a claim filed in court:

> (1) An Architect shall not, unless registered as a sole proprietorship, a partnership or a body corporate and has been issued with a certificate of registration:
>
> (b) recover in any court any fee, charge, remuneration or other form of consideration for architectural consultancy services rendered as an architectural consultancy practice.

(b) Sub-rule 23, Third Schedule, part one of the Rules: which gives the professional architect and his client the option of referring their dispute to mediation, although an initial reference to mediation is not a condition precedent for the parties to refer their dispute to arbitration in accordance with sub-r. 24;

(c) Sub-rule 24, Third Schedule, part one of the Rules: which essentially states that disputes between a professional architect and his client which require settlement shall be by way of arbitration. Further, in the event the professional architect and his client are unable to appoint an arbitrator, either party may submit a written request to the President of the Board of Architects Malaysia (BAM) to appoint a person to serve as an arbitrator:

> 24. (1) In the event of any dispute between the Professional Architect and the client, whether arising during or after the rendering of architectural consultancy services under the Memorandum of Agreement, either party shall give a notice in writing to the other party informing him of the matter in dispute and requiring its settlement.
>
> (2) The Professional Architect and the client **shall** appoint an arbitrator within fourteen days from the date of the notice.
>
> (3) If the Professional Architect and the client fail to appoint an arbitrator within fourteen days from the date of the notice, *either party may submit a written request to the President of the Board to appoint a person to serve as an arbitrator, but whose award shall be final and binding on both the Professional Architect and the client*. (emphasis added)

[61] Ms Tanya then turned her attention to CIPAA. She said that from the preamble, it might be gleaned that CIPAA is an act of general application to facilitate regular and timely payment and to provide remedies for the recovery of payment in the construction industry.

[62] She cited the case of *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527, where the High Court examined the intention of Parliament in enacting CIPAA by reference to the long title of the Act and went on to hold as follows:

> [92] As stated in the long title of the Act, ... **Each of these objectives relate to or is connected with payment**; be it to facilitate regular and timely payment; provide speedy dispute resolution through adjudication which we have seen is also about payment; or to provide remedies for the recovery of payment in the construction industry. This long title of the Act confirms and reaffirms the observation that the Court had earlier made, that **the Act is, in essence and in reality legislation dealing with a very niche aspect of the construction industry. It only deals with payment** which generally arise in the course of executing the relevant works or as the works progress; and how to secure that payment. *Even the last general objective which is frequently seen in long titles; that the Act provides for "connected and incidental matters" must necessarily be understood to refer to the earlier intent or objectives that relate to payment*. (emphasis added)

[63] She said from the extract of the judgment above that one thing is made evidently clear - CIPAA is an act to facilitate recovery of payment.

[64] This court agrees that the parameters for CIPAA's application and non-application have been expressly set out in ss. 2 and 3 respectively. CIPAA would apply to every "construction contract" for as long as the contract is made in writing.

[65] The intention of Parliament in enacting CIPAA was the subject of some judicial discussion in *UDA Holdings Bhd v. Bisaraya Construction Sdn Bhd (supra)*. Learned counsel Miss Tanya highlighted the following where this court held, *inter alia*, that:

(a) paragraph (136) - adjudication is a dispute resolution mechanism;

(b) paragraphs (3) and (84) - the KLRCA is the body cloaked with authority to administer matters related to adjudication under CIPAA;

(c) paragraph (80) - the adjudication process starts with a payment claim issued pursuant to s. 5, by a party who claims to be an 'unpaid party' to a non-paying party pursuant to a construction contract;

(d) paragraph (88) - the definitions found in s. 4 are "unusually definitive and exhaustive in their defines as opposed to the practice of drafting general or non-exhaustive definitions". To this end, the court went one step further to state:

> [89] This definitive, exclusive as opposed to inclusive, and exhaustive style of defining and interpreting terms found in this Act must not be overlooked. It is the view of the Court that this clues one in to some considerable degree as to the operation and intention of the Act. **From these definitions and the provisions within which they appear, it may be deduced that the terms have a particular and peculiar but limited meaning and understanding**. That these meanings operate within the confines of the Act and no other ... (emphasis added)

[66] She submitted that the juxtaposition of the CIPAA and the Architects Act would immediately raise the following concerns.

[67] First, adjudication under CIPAA is a means of dispute resolution which ARMC had availed itself to in contravention of the mandatory dispute resolution mechanism by arbitration provided under the Rules.

[68] Secondly, from a reading of the definition provision under s. 4 and the parameters of CIPAA's application in s. 2, it is made abundantly clear that CIPAA only applies to 'construction contracts' and not contracts between a professional architect and his client which falls under the purview of the Architects Act read together with the Rules.

[69] Thirdly, the appointment of an adjudicator under CIPAA falls within the jurisdiction of KLRCA whereas the appointment of an arbitrator under the Architects Act read together with the Rules vests with the President of the BAM.

[70] She pointed out that Martego's application for setting aside the adjudication decision is premised on the differences which arise between the application of CIPAA and the Architects Act. She sought to persuade the court that Martego's position and one which is supported by established canons of statutory interpretation that the dispute is one which falls squarely within the confines of the Architects Act and not CIPAA.

[71] Notwithstanding the jurisdictional objection raised by Martego, the adjudicator proceeded with the adjudication proceedings and delivered his adjudication decision pursuant to s. 27(3) of the CIPAA which was a procedure that the adjudicator was free to follow as Parliament had expressly allowed him to.

[72] Martego had first advanced this jurisdictional objection in its adjudication response dated 4 February 2016. Under CIPAA a jurisdictional objection may be raised at any time after commencement of adjudication even until the hearing of the setting aside application for s. 15 clearly allows for the setting aside of an adjudication decision on the ground of excess of jurisdiction. I do not think that by serving a payment response without raising the issue of jurisdiction, Martego had waived its right to object to the adjudicator's jurisdiction. Surely unless both parties have expressly agreed in writing to extend the jurisdiction of the adjudicator under s. 27(2), the question of jurisdiction could still be raised at the setting aside stage. It was raised when Martego filed its adjudication response.

[73] In *Cowlin Construction Limited v. CFW Architects* [2002] EWHC 2914 the English Court took the view that objections to jurisdictions must be taken early failing which the party raising it late must be taken as having waived it all together. Whilst that may be true of the position in the UK, here in Malaysia we have our s. 27(3) of the CIPAA which allows the adjudicator to continue to a conclusion once a point of jurisdiction is raised, envisaging that the law allows the issue of jurisdiction to be taken up even at the setting aside stage.

[74] Learned counsel for Martego said that one should apply the rule of construction expressed by the Latin maxim *generalibus specialia non derogant* makes it trite that where there are two provisions of written law, one general and the other specific, the specific legislation or the special provision in the specific legislation will exclude the operation of the general legislation. She referred to a plethora of case law which supports this position as can be seen in:

(a) *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719 where Gopal Sri Ram JCA (as His Lordship then was) at p. 550 (CLJ); pp. 758 - 759 (MLJ) in delivering the judgment of the Court of Appeal held:

> It lies in the rule of construction expressed in the maxim *generalibus specialia non derogant*. Where there are two provisions of written law, one general and the other specific, then, whether or not these

A two provisions are to be found in the same or different statutes, the special or specific provision excludes the operation of the general provision.

(b) *Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors* [2001] 1 CLJ 604; [2001] 2 MLJ 23 where Justice Abdul Malik Ishak J (later JCA) had, B in reliance on the Court of Appeal decision in *Luggage Distributors* (*supra*), held that the specific provision in the Rules of the High Court 1980 must necessarily take precedence over the general provision in the same legislation; and

(c) *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796; [2003] C 1 MLJ 22 where justice Abdul Malik Ishak J (later JCA) held at p. 41 that the maxim *generalibus specialia non derogant* is of "universal application and it is very efficacious". In reliance on the Latin maxim, His Lordship held that the specific provisions in the Housing Development (Control and Licensing) Regulations 1989 which were D enacted pursuant to the Housing Development (Control and Licensing) Act 1966 must take precedence over the Contracts Act 1950:

> Likewise here, the sale and purchase agreements made in accordance with Schedule 'H' to the Housing Regulations which were in turn made under the Housing Act must take precedence E over the Contracts Act 1950. Being a specific piece of social legislation enacted solely to protect house buyers from unscrupulous developers, the standard sale and purchase agreements signed by the plaintiffs must take precedence over the Contracts Act 1950 and must be given effect accordingly.

F **[75]** She then applied the Latin maxim to the present facts and concluded that ARMC cannot avail itself of the adjudication process under the general legislation of CIPAA when the industry-specific Architects Act makes it mandatory for disputes between a professional architect and his client to be resolved by way of arbitration. The Architects Act must prevail over CIPAA which is of general application to the 'construction industry'.

G

[76] I agree that the dispute resolution mechanism under CIPAA is by way of adjudication and the statutory requirement for dispute resolution under the Architects Act is by way of arbitration. I must also state that there is nothing strange in this difference as statutory adjudication came into being H only with the coming into force of CIPAA on 10 April 2014 and that there is no need to see adjudication and arbitration to be mutually exclusive of each other as adjudication would only yield a decision of temporary finality and it is only with arbitration or litigation that one gets a final and binding decision. The whole scheme of statutory adjudication was never intended to be set in opposition to arbitration or litigation. Adjudication operates I independently on a separate track and indeed a fast track and it will not run into collision with arbitration or litigation simply because its track is different. Before there was adjudication, there were already arbitration and

litigation. After the introduction of adjudication, both arbitration and litigation will still continue except that now there is an additional dispute resolution mechanism of temporary finality that can be embarked upon before or concurrently with arbitration or litigation as the case may be. Thus one need not have to choose in an "either or" approach between adjudication and arbitration but one can proceed in a "both and" approach in resolving a dispute on an architect's claim against his client for his professional fees. Adjudication under CIPAA was never designed to be in conflict with arbitration and litigation and so its process may be activated at any time when there is a valid payment claim under a construction contract. Premised on that proper perspective, the question of which would prevail over the other does not arise at all.

[77] There is thus no place nor purpose for Martego to apply the principle of construction of *generalibus specialia non derogant* simply because this is not a case where one procedure has to be preferred over another for in the first place it was not pitted against the other.

[78] At any rate where adjudication is concerned, CIPAA is certainly a special piece of legislation that would in that sense prevail over the Architects Act which deals generally with matters pertaining to architects. To compare the Architects Act to CIPAA and to conclude that the Architects Act is a special and more specific piece of legislation would be to compare apple with orange and to conclude that apple is more special a fruit to orange! That would be quite uncalled for.

[79] Learned counsel for Martego also referred to *Akitek Tenggara Sdn Bhd v. Mid Valley City Sdn Bhd* [2007] 6 CLJ 93; [2007] 5 MLJ 697, where the Federal Court was called upon to determine, *inter alia*, the proper forum for resolution of disputes between an architect and his client.

[80] His Lordship Augustine Paul FCJ held:

> [34] It is clear that LAM is only empowered to hear and determine disputes relating to professional conduct. The section gives no power to LAM to hear disputes between an architect and his client. *Specific provision has been made for the resolution of such disputes. It is contained in r. 21 of the Fourth Schedule to the Architects Rules 1973 as amended in 1986 ('r 21').* It reads as follows:
>
> > In the event of any dispute between the Architect and the client, whether arising during or after the rendering of services under the agreement, either party shall give notice in writing to the other party informing him of the matter in dispute and requiring its settlement. The parties shall then appoint an Arbitrator but if they fail to do so within 14 days of the date of the notice, either party may submit a written request to the President of the Board of Architects to appoint a person to serve as an Arbitrator, whose award shall be final and binding on both the Architect and the client.

A

> [35] As the dispute in this case in one that relates to the agreement between an architect and his client with regard to services rendered it has nothing to do with the professional conduct of the architect. **The procedure laid down by law to be followed in respect of the dispute in this case is therefore as in r. 21** (emphasis added)

B **[81]** She pointed out that the Architects Rules 1973 which was referred to by the Federal Court in *Akitek Tenggara (supra)* has since been repealed by the Architects Rules 1996. However, r. 21 of the repealed rules continues to be given the force of law by virtue of sub-r. 24 of the Third Schedule of the Architects Rules 1996.

C **[82]** Again I have no problem with the pronouncement of the law there. It was before the introduction of adjudication under CIPAA and it was not a case where the court had stated that the procedure for dispute resolution on fees is that of arbitration as opposed to adjudication.

[83] She further argued that the statutory right to adjudication under
D CIPAA cannot override the statutory requirement to refer to arbitration under the Architects Act. Here again, we are not pitting one legislation against another as if the two are in conflict against each other. There is no conflict here but a complementarity that can only lead to the convergence of a final resolution on a claim where an architect's fees is concerned.

E

[84] I agree with Mr Siva for ARMC that s. 7A of the Architects Act and r. 24 of the Rules are not the only mechanism to resolve disputes on architect fees. CIPAA acknowledge the fact that the other dispute resolution process can be launched simultaneously. This is clearly provided for in s. 37(1) as follows:

F

> A dispute in respect of payment under construction contract may be referred concurrently to adjudication, arbitration or the court.

[85] Martego could have commenced arbitration proceedings concurrently with adjudication pursuant to s. 37(1) of the CIPAA. Whilst it
G is true the use of the word 'shall' in sub-r. 24(1) of the Architects Rules makes it unequivocal that the parties refer their dispute on architect's fees to arbitration as opposed to litigation, that does not mean that architects cannot avail themselves of a subsequent mode of dispute resolution mechanism introduced later *albeit* of temporary finality in adjudication.

H **[86]** I agree that in the light of the express intent of sub-r. 24 of the Architects Rules which; (a) directs the professional architect and his client to refer the dispute to arbitration; and (b) vests the power of appointment of an arbitrator with the President of the BAM in the absence of consensus between the parties; and (c) directs that the decision of the arbitrator is final
I and binding on the professional architect and his client, ARMC is obliged to settle the dispute by way of arbitration as opposed to litigation only in cases where adjudication was not introduced yet.

[87] After the introduction of statutory adjudication under CIPAA, the architects would have an additional mode of dispute resolution though it is only through arbitration that the parties would arrive at an award that is final and binding.

[88] To accede to Martego's argument would mean that where there is an arbitration clause in a construction contract which is no different from an arbitration clause provided for in the Architects Act, then there can be no adjudication of a payment claim under CIPAA. That can only lead to a disastrous situation for almost all standard form construction contract would have an arbitration clause and surely that cannot mean that as arbitration is the agreed mode of dispute resolution then adjudication cannot apply at all.

[89] Statutory adjudication does not require the agreement of the parties to commence the process and prevails over any contractual agreements to the contrary between the parties. Statutory adjudication stands alone and aloof of all other alternative modes of dispute resolution like arbitration or litigation. In *Ranhill E&C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases* [2015] 1 LNS 1435 the High Court held at para. (40) of the judgment that:

> ... the right to refer to adjudication is a statutory right the (sic) cannot be rendered meaningless by reason of a good **contractual promise** to arbitrate (emphasis added)

[90] Therefore by way of letter dated 13 November 2015, Martego's solicitors was entitled to issue a notice of arbitration to ARMC where they had proposed and sought ARMC's agreement to their choice for arbitrator. ARMC was equally entitled to issue its payment claim on the same day, 13 November 2015.

[91] Miss Tanya Lopez submitted her client's intention to commence arbitration was abandoned after ARMC issued its payment claim. She said it would not have made economical sense for Martego to carry on with the arbitration in light of the adjudication (despite Martego's jurisdictional challenge) as pursuant to s. 27(3) of the CIPAA, it was within the adjudicator's discretion to complete the adjudication proceedings, and in fact his discretion was exercised in that manner.

[92] She further submitted that it was not Martego which was making a claim for its fees or remuneration, rather, it was ARMC. As such, it would have been entirely up to ARMC to commence the necessary proceedings for recovery of its remuneration for as long as such proceedings were compliant with the law. If that be the case, then it is not for Martego to complain now that the adjudication decision is not in its favour.

[93] In all this debate we must not forget Parliament's intention in enacting CIPAA is to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the

construction industry and to provide for connected and incidental matters. The objective and purpose of CIPAA are to provide a solution to payment problems that stifles cash flow in the construction industry.

[94] Martego's claim that CIPAA has no application to the dispute as the parties had made specific contractual arrangements for dispute resolution under cl. 7 of the contract is totally misplaced. It would lead down the dangerous road of giving tacit consent to the parties contracting out of CIPAA which can only have the effect of thwarting the purpose of CIPAA altogether.

[95] Martego is still at liberty to pursue with arbitration to correct what it deems to be a wrong decision arrived at by the adjudicator.

Whether There Has Been A Breach Of Natural Justice When The Adjudicator Decided To Proceed With The Adjudication Without An Oral Hearing

[96] Martego's second ground in support of its application for setting aside is that it has been denied an opportunity to be heard, despite indicating in three separate documents that an oral hearing is necessary:

(a) the adjudication response dated 4 February 2016;

(b) Martego's solicitors' email dated 19 February 2016; and

(c) Martego's solicitors' email dated 12 April 2016.

[97] Learned counsel for Martego explained that the request for a hearing was to allow Martego an opportunity to ventilate the disputes of fact through the calling of witnesses, without prejudice to Martego's position that the adjudicator did not have jurisdiction to hear the dispute at the outset.

[98] ARMC's claim included the full 35% under the contract in respect of services which it rendered for Tower 1. Before commencement of adjudication, Martego had already paid ARMC approximately 15% of the fees payable for Tower 1. To be entitled to the full 35% under the contract, ARMC would have had to show that they had in fact prepared tender drawings.

[99] Martego's counsel submitted that there was conflicting evidence from various parties on whether tender drawings for Tower 1 were in fact prepared. While ARMC was firm in its position that tender drawings were submitted, Martego exerted that the drawings submitted lack sufficient detail to form part of the tender documentation.

[100] To determine whether or not ARMC did, in fact, prepare and submit tender drawings, Miss Tanya submitted that the evidence of Martego's Quantity Surveyor, Mr Phoon Peng Kong ("QS") and one Encik Zainal Mohd Daud, the former managing director of Martego, would be crucial.

[101] The adjudicator had, in the adjudication decision, acknowledged the conflicting positions taken by ARMC and Martego on the issue. The adjudicator then relied on a letter dated 12 February 2016 by Encik Zainal where he had confirmed that Martego had "acknowledged receipt of the complete tender set" to bind Martego that it had, in fact, received a complete set of tender documents, although with some missing details.

[102] Martego had urged the adjudicator to view the letter dated 12 February 2016 with circumspect for various reasons which the adjudicator did not agree with. It was said that the letter was issued by the former managing director of Martego to support ARMC's claim. It was submitted by Martego that the letter dated 12 February 2016 was not a contemporaneous document and the necessary inference is that it was prepared solely to boost ARMC's claim in the adjudication.

[103] In such situations, learned counsel for Martego submitted that it becomes incumbent upon an adjudicator to hold a hearing to test the weight which ought to be given to the letter dated 12 February 2016 and the circumstances which led Encik Zainal to issue the said letter and perhaps even decide if the said letter ought to be disregarded as evidence altogether. She further argued that the probability of concealed material facts being disclosed and discovered is higher during cross-examination of a witness as opposed to a mere reading of documentary evidence by the adjudicator.

[104] It can be said here that if the letter of 12 February 2016 from the former Managing Director of Martego was not a contemporaneous document, then the same could be said of the QS's letter of 30 March 2016. In the said letter the QS had raised the point that some of the drawings submitted were lacking in details.

[105] Learned counsel for Martego submitted that the oral evidence from the QS, representatives of ARMC and Encik Zainal, would have answered once and for all the question on ARMC's entitlement for its claim on Tower 1.

[106] The adjudicator decided that ARMC was not entitled to the full 35% of its claim and made a deduction of 20% from ARMC's 35% entitlement:

> 197. The Claimant's entitlement for the fee for Tower 1 is RM856,334.00 x 0.35 x 0.80 = RM239,773.00

[107] The amount awarded in respect of Tower 1 is significantly higher (more than 81%) than the amount which Martego had already paid ARMC in respect of Tower 1 which is RM44,957.60.

[108] She said that the adjudicator's refusal to hold a hearing despite Martego's insistence for a right to be heard in the instant case was a material breach which is of considerable importance to the outcome of the adjudication decision.

[109] She concluded that, even if the adjudicator did not want to hold an oral hearing, the adjudicator ought to have invited parties to appoint independent quantity surveyors to suggest the percentage of deduction which ought to have been made in the event the whole of the 35% claim was not allowed.

[110] I agree with Mr Siva for the architect ARMC that the adjudicator had carefully considered the request for an oral hearing and had given his reasons for rejecting the request at paras. 95 to 102 of the adjudication decision:

> 95. On 19/02/2016, the Respondent requested for a hearing to be conducted "so that the parties can properly ventilate the issues of fact that are in dispute, namely, the precise works that were carried out as well as the amount paid for the said works".
>
> 96. I have rejected their request as the above issue can be decided by documents alone.
>
> 97. Then on 12/04/2016, 6 days before the mandatory dateline to deliver the Adjudication Decision, the Respondent applied for a hearing, citing the same reason.
>
> 98. As the objective of adjudication under CIPAA is to provide a speedy resolution of payment dispute, any such oral hearing will only be conducted when there is a need to do so.
>
> 99. During the adjudication proceeding, the Parties are given ample opportunities to submit documents, make submissions and reply to submission.
>
> 100. As I do not see any need of an oral hearing for this dispute and pursuant to Section 25(a) of CIPAA, I rejected their request for an oral hearing.
>
> 101. Therefore pursuant to Section 25(a) of CIPAA, I have decided to conduct the adjudication proceeding by submission of document only and there will be no oral hearing.
>
> 102. I have issued following Orders For Directions with respect to the conduct of the adjudication proceeding:
>
> (a) Order For Direction No 1 - orders were issued on following issues:
>
> (i) Confirmation of the appointment as the Adjudicator;
>
> (ii) Legislative jurisdiction (CIPAA) and Rules governing the Adjudication (Construction Industry Payment and Adjudication Regulations 2014);
>
> (iii) Confidentiality;
>
> (iv) Communication protocol;
>
> (v) Mode of service of documents;
>
> (vi) Submission of costs.

(b) Order For Direction No 2 - orders on following issues:

(i) The request by the Respondent for the extension of time of one month to serve the Adjudication Response was not accepted;

(ii) The statutory limit of 10 working days shall be adhered to strictly.

(c) Order For Direction No 3 - orders on the following:

(i) No case management conference will be held;

(ii) Further submission from the Parties on the relevancy of the Architect (Scale of Minimum Fees) Rules 2010 in relation to this dispute;

(iii) Pursuant to Section 25 of CIPAA, the Parties are instructed to submit further particulars;

(iv) **The Claimant shall provide a list of architectural drawings submitted to the Respondent pursuant to the application by the Respondent for an order of discovery**.

(d) Order For Direction No 4:

(i) The Parties may make submissions in reply in respect of the submissions made by the other party pursuant to Order For Direction No. 3.

(e) Order For Direction No. 5:

i. The Parties are instructed to submit final written submission on the dispute. (emphasis added)

[111] Martego is basically dissatisfied with the adjudicator's decision in awarding the sum claimed by ARMC in respect of Tower 1, less a deduction of 20% (amounting to RM239,773). It is a decision that the adjudicator is entitled to arrive at based on the weight that he would attach to the letter of the previous Managing Director of ARMC taken together with the letter of the QS. The adjudicator did not grant ARMC the whole of its claim but only 80% of it, based on the extent of the work completed with respect to the drawings submitted. When I consider the relevant reasons given by the adjudicator, I have to conclude that it is a finding of fact based on the documentary evidence before him and not a case where there had been a breach of natural justice in arriving at the decision that he did.

[112] He considered the evidence in the documents submitted by both parties and after reading the submissions of both parties, he arrived at his decision. The party aggrieved by his decision cannot elevate the rejection of their request for an oral hearing to a breach of natural justice on the assumption that had he heard the witnesses orally, he would have come to a different decision. That would be going into the sufficiency of the evidence

and the weight to be attached to it and to indirectly set aside the decision on the ground of the failure to properly appreciate the evidence before him. That is not a ground countenanced under s. 15 of the CIPAA and this is not an appeal.

[113] Mr Siva for ARMC had referred to the Singapore case of *AM Associates (Singapore) Pte Ltd v. Laguna National Golf and Country Club Ltd* [2009] SGHC 260, where Judith Prakash J, in a similar context, made this cautionary note:

> 23. There are two rules of natural justice: the first is that a man should not be the judge in his own cause and the second is that the judge or Adjudicator or other arbiter must hear both side of the dispute. The second rule is often referred to by its Latin tag, *audi alteram partem*. Laguna's submission, while not specifically identifying which rule of natural justice had been breached, appeared to refer to the second one.
>
> 24. Laguna submitted that the Adjudicator had failed to comply with the rules of natural justice in that in coming to the Adjudication Determination, he had failed to take into consideration and/or give proper weight to materials tendered by AMA which showed a discrepancy in AMA's claim, in particular, its claim that the Concept Design had been approved. Its submissions went into the evidence in order to establish the alleged discrepancy and it then argued that if the Adjudicator had given proper consideration and weight to such discrepancy and had taken into consideration the relevant evidence tendered by the parties, he would have held that all payment claim made by AMA had been made prematurely.
>
> 25. Although the paragraph above contains only a brief summary of Laguna's contentions, it can be gathered from such summary that what Laguna was complaining about was not really a failure on the part of the Adjudicator to hear both sides of the dispute but a failure on his part to decide the dispute as Laguna considered it should be decided. *The audi alteram partem rule required the Adjudicator to receive both parties submissions and consider them; it did not require him to decide the dispute in accordance with Laguna's submissions. It was clear from the Adjudication Determination that the Adjudicator had conducted the adjudication in accordance with the principles of natural justice: he had called an adjudication conference at which both parties were able to make their submissions, an opportunity which Laguna had availed itself of. Thereafter, as the Adjudication Determination itself made plain, the Adjudicator gave consideration to all points raised and he then came to certain conclusions for which he gave his reasons. However dissatisfied Laguna may be with those decisions, it cannot ask for the Adjudication Determination to be set aside because it considers the decisions to be against the weight of the evidence.*
>
> 26. The principles of natural justice are concerned with the provision of a fair hearing to contending parties. They do not mandate any particular result. *As long as the parties have been given a fair hearing, the decision cannot be set aside for failure to comply with natural justice. A party who is dissatisfied with the decision on its merits cannot use the principles of natural justice to have the decision set aside* ... (emphasis added)

[114] The adjudicator had given his reasons for accepting the evidence of Encik Zainal the previous managing director at paras. 175 and 176 of the adjudication decision:

> 175. However the Respondent submits that the above statement has to be viewed with circumspect for the following reasons:
>
> (a) The letter was issued for this adjudication proceeding and is not a contemporaneous document.
>
> (b) The statement has not been tested in cross-examination.
>
> (c) He does not have any experience in building and construction and his specialisation is in hotel management and tourism.
>
> 176. With due respect, I do not agree with the submission by the Respondent for following reasons:
>
> (a) His statement serves as a witness of facts.
>
> (b) **The weight of the evidence will be taken with the view that the witness is not cross-examined. In any case all witnesses in this proceeding including the Respondent, are also not cross-examined**.
>
> (c) He is employed by the Respondent as the Managing Director, who is a key man of the company. The Respondent must be satisfied of his competency on construction and property development when engaging him for such an important post.
>
> 177. On the other hand, the Claimant in their submission pursuant to Order for Direction No. 4 admitted that some information are missing such as sanitary ware, fittings and ironmongery and whereby tender could still be called by providing for Prime Cost item for these missing items. (emphasis added)

[115] The adjudicator highlighted the fact that Martego's initial position was that "no tender documents ever existed" (para. 164). This position changed in Martego's adjudication response when it admitted the tender documents were submitted but lacked detail.

[116] The adjudicator concluded with a finding of fact that:

> 180 Accordingly, I determine that the Respondent did receive a set of tender drawings for Tower 1, *albeit* with some missing details.

[117] Learned counsel for Martego submitted that the adjudicator's decision which he arrived at without the benefit of a hearing is arbitrary and without basis. For example, no explanation was given as to the reason why only 20% was deducted from the 35% claimed. She castigated the adjudicator's action as one where he had gone on a frolic of his own to determine a rate for deduction without any basis whatsoever.

[118] She further submitted that the adjudicator may not know the extent of the incompleteness of the tender drawings submitted by ARMC in order to assess the appropriate deductions to be made without the benefit of oral evidence.

[119] I have difficulty accepting that submission of Martego. A reading of paras. 190 to 196 of the adjudication decision would show the meticulousness of the adjudicator and his method in arriving at his decision of granting only 20% of the 35% payable under the contract for Tower 1:

> 190. From clause 154 above, since the Architect (Scale of Minimum Fees) Rules 2010 is not part of the Contract, the term of payment shall be governed by the contractual provision, i.e. 35% shall be payable upon completion of tender drawings.
>
> 191. As the missing details are only amounting to breach of warranty and not condition, the Claimant is entitled to be paid for the work done, *albeit* a deduction for the defective work has to be made.
>
> 192. In this case, I hold that a deduction of 10% from the fees due for Tower 1 is to be made for the missing details.
>
> 193. In addition it is a normal practice that the tender drawings are prepared either after the approval of the Building Plans or concurrently when the Building Plans are submitted for approval.
>
> 194. Therefore the approval of the Building Plan should be considered as part of the scope of work in order to satisfy the term on "upon completion of tender drawings".
>
> 195. As the Claimant did not complete the phase of Building Plans approval, a further deduction of 10% will be applied to the fees under Tower 1.
>
> 196. Therefore total deduction from the fees entitlement is 20%.

[120] As can be clearly seen, this is not just a finding of fact based on the evidence before the adjudicator, the adjudicator had set out his reasons for arriving at his decision and this court cannot see how that decision arrived at after considering the documents and submissions filed can be said to be a breach of natural justice.

[121] In *ACFM Engineering & Construction Sdn Bhd v. Esstar Vision Sdn Bhd & Another Case* [2015] 1 LNS 756, Mary Lim J (now JCA) states that:

> [53] I agree. It is not simply any breach or denial which will forestall the enforceability of the adjudication decision or be a ground for setting aside that decision. The breach must be "**either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant"; it must be material**. (emphasis added)

[122] Mary Lim J (JCA) further stated that "[46] ... what would be required is at the very least, a statement of the adjudicator's reasons for the decision reached. Brevity is not a reason for complaint. The reasons may be succinct; enough or sufficient to show that the adjudicator has dealt with the very issues remitted to him and what his conclusions are on those issues. The reasons may be wrong on the facts or even the law but I do not believe that is enough cause to interfere. The courts must exercise considerable restraint

when invited to set aside an adjudication decision reached in very exacting circumstances and conditions. So much so that I believe it will only be in the rare and extreme circumstances that the reasons, brief or otherwise is found wanting."

[123] By no stretch of the imagination or ingenuity can it be said that the adjudicator has committed a breach of natural justice merely because he does not decide the dispute in accordance with the preferred manner advocated by one of the parties or refused to assign the weight to the evidence as expected by a party.

[124] In *Ranhill E&C (supra)*, the High Court held that:

> [82] ... It is not simply any breach or denial which will forestall the enforceability of the adjudication decision or be a ground for setting aside the decision. The breach must be "either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant", it must be material.

[125] Further at para. (92) it was held that in order for there to have been a denial of natural justice by the adjudicator, Tioxide (the defendant) had to show, *inter alia*:

> (a) that the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to have been given the opportunity to comment upon if decisive or of considerable potential importance to the outcome of the resolution;
>
> (b) that the adjudicator has gone off on a frolic of his own, ie. deciding a case based on a factual or legal basis which has not been argued or put forward by either side;
>
> (c) that the adjudicator has decided on an issue or issues outside his jurisdiction ...

[126] The *dicta* of Chadwick LJ in *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, is a useful reminder in maintaining a proper appreciation and perspective of the statutory adjudication process introduced in many jurisdiction:

> [85] The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the Adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an Adjudicator. the courts should give no encouragement to the approach adopted by DML in the present case; which is contrary to DML's outline submissions, to which we have referred in para 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".

A [86] It is only too easy in a complex case for a party who is dissatisfied with the decision of an Adjudicator to comb through the Adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction" or "breach of natural justice". It must be kept in mind that the majority of Adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in
B other disciplines. The task of the Adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the Adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor
C (or subcontractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash flow requirements of contractors and their sub-contractors. The need to have the "right" answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive
D answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an Adjudicator faced with the need to reach a decision in a case like the present.

E [87] In short, in the overwhelming majority of cases, *the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the Adjudicator. If he does not accept the Adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to*
F *challenge the Adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense - as, we suspect, the costs incurred in the present case will demonstrate only too clearly.* (emphasis added)

[127] The same ethos has been espoused in *ACFM Engineering & Construction Sdn Bhd v. Esstar Visions Sdn Bhd & Another Case* [2015] 1 LNS
G 756. In *Foster Wheeler E&C Malaysia Sdn Bhd v. Arkema Thiochemicals Sdn Bhd & Another Case* [2015] 1 LNS 632, Mary Lim J (now JCA) held that:

[29] As for the argument on multi-tiered dispute resolution mechanisms, it will be difficult to say that the Courts do not subscribe to the general encouragement and promotion practised by other Courts in other
H jurisdictions advocating alternative dispute resolution. The Malaysian law journals are replete with case authorities sounding the same refrain. Consensual alternatives on dispute resolutions particularly in commercial disputes instead of cutting a direct route to the Courts and engaging in adversarial litigation are always good values to adopt and support; it is not
I just in the public interest but for the public good as the Courts' valuable time and resources can then be freed up to deal with the other problems that beset human life.

But, that is looking at alternative dispute resolutions in isolation and not in the context of adjudication. *Insofar as these mechanisms are concerned, CIPAA 2012 has made provisions for their inter-relation or interfacing. When it comes to taking all these alternatives, including referring the subject matter, dispute, difference or claim to arbitration or the Court, CIPAA 2012 recognises that both of these alternatives may be launched concurrently. That is clearly provided in subsection 37(1)* which provides:

(1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.

This may also be inferred from section 13 which provides that the adjudication decision is binding unless

(a) it is set aside by the High Court on any of the grounds referred to in section 15;

(b) the subject matter of the decision is settled by a written agreement between the parties; or

(c) the dispute is finally decided by arbitration or the Court.

(emphasis added)

Pronouncement

[128] I am confident that an expansive reading must be given to the definition section where the purpose of the CIPAA is concerned to ensure that the benefits of it would flow downwards to all who have hitherto been affected by the culture of delayed payments in construction contracts.

[129] I have no difficulty in holding that an architect's fees are claimable under adjudication under CIPAA. I am more than satisfied that there has been no breach of natural justice in the mode of hearing that the adjudicator had decided to follow which was by way of "documents and submissions only" hearing without the need to call witnesses.

[130] Martego's application was thus dismissed with costs of RM10,000 to be paid by Martego and correspondingly ARMC's application to enforce the adjudication decision was allowed with costs of RM5,000 to be paid by Martego to ARMC.

[131] Allocatur to be paid before extraction of order of costs.